NO. 48945-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

CURTIS VINCENT,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

The Appellant, Curtis Vincent, was charged by Information filed in Grays Harbor County Superior Court on February 17, 2016, with a Violation of the Uniform Controlled Substances Act for Possession of Methamphetamine on February 14, 2016. Clerk's Papers (CP) 1. The case proceeded to trial on April 12, 2016. Report of Proceedings 5.

At trial, the jury heard testimony from Officer David Tarrence, Jr., Corrections Officer David Tarrence, Sr., Forensic Scientist Debra Price, Detective Jason Perkinson, and the Appellant himself. RP 2. Officer Tarrence testified that he arrested the Appellant, who was wearing a hat at the time, searched the hat incident to arrest without pulling away the sweatband, placed the hat back on the Appellant's head, and then transported him to the jail. RP 18. There, Officer Tarrence turned the Appellant over to his father, Corrections Officer Tarrence, who completed a jail inventory of the Appellant's property and discovered a plastic bag containing methamphetamine in the sweatband of his hat. RP 28. The Appellant testified that he had put the hat on that morning, that the hat belonged to him, that no one else wore his hat, that he "sometimes" kept methamphetamine in the hat, that he kept his bags after using methamphetamine, and that because he did not scrape his bags clean there

was actually methamphetamine left in them. RP 50-52. Detective Perkinson testified that during an interview, with regard to the methamphetamine found in his hat, the Appellant stated "[t]hat he didn't think he had anymore." RP 75.

During the lunch recess, the parties discussed jury instructions with the court. RP 66. With regard to the jury's instruction on possession, which followed WPIC 50.03 and read, "Possession means having a substance in one's custody on control," (CP 40) the following exchange took place:

> MS. MILLAR: We discussed this before Your Honor came in to court. I think we're in agreement on everything except obviously the State's made its objection to the unwitting possession instruction. I just note that for the record as well again. And then as to number - where is it – number 5. I think both parties agree that there is no issue of constructive possession in this case, that we're only talking about actual possession. And the comments to that - that particular WPIC indicate that if you - if you don't have an issue with constructive possession, then there is really - there's no need to have all those paragraphs on proximity and things of that nature. And so I believe both parties agree that only the first sentence should be in that instruction.
>
> THE COURT: All right.
>
> MR. CREEKPAUM: That is agreed, Your Honor.
> ...
> THE COURT: ... Since you're in agreement, I will revise Number 5 just to include the first sentence. And with that

change, any further exceptions or objections from the defense?

MR. CREEKPAUM: No exceptions or objections, Your Honor.

RP 66-67. The jury returned a verdict of guilty as charged and this appeal timely followed. CP 44, 74.

RESPONSE TO ASSIGNMENTS OF ERROR

1. When viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the Appellant was in possession of methamphetamine.

When the sufficiency of the State's evidence is challenged, the conviction will be affirmed if the court is satisfied there is sufficient evidence to justify any rational trier of fact to find guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In other words, the evidence has to be sufficient enough to convince *at least one* jury and the conviction will be reversed only if no rational trier of fact could find guilt beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748 (2003). "The inquiry does not require the reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt but rather whether *any* rational trier of fact could be so convinced." *State v. Smith*, 31 Wn. App. 226, 640 P.2d 25

(1982). In its examination, the court must accept the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). Additionally, all of the evidence must be viewed in the light most favorable to the State with all reasonable inferences being interpreted "most strongly against the defendant." *State v. Taylor*, 97 W. App.123, 982 P.2d 687 (1999). Lastly, since credibility is a matter for determination solely by the trier of fact, the court must not consider the credibility of witnesses in making its determination. *State v. McBride*, 74 Wn. App. 460, 873 P.2d 589 (1994). These general rules have been applied in hundreds of reported cases, usually resulting in the conviction being affirmed. Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 301.7 (6th ed. 2016).

a) Having an item in the hat on one's head, like having an item in one's pocket, is indeed "actual" possession.

"Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400(1969)). The human anatomy does not naturally contain places in which personal

objects can be carried. *State v. Byrd,* 178 Wn.2d 611, 621, 310 P.3d 793 (2013). However, personal items may be 'so intimately connected with' an individual that a search of the items constitutes a search of the person. *State v. Parker,* 139 Wn.2d 486, 498–99, 987 P.2d 73 (1999) (quoting *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). In the context of searches incident to arrest, for instance, our courts have approved the examination of items "immediately associated with the arrestee's person" and therefore in their actual possession, including those items "in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." *Byrd*, 178 Wn.2d at 621, 623 (citing *United States v. Rabinowitz*, 339 U.S. 56, 78, 70 S.Ct. 430, 94 L.Ed. 653 (1950)).

The Appellant inexplicably suggests that because the methamphetamine in his possession was in a plastic bag inside the hat he was wearing, he was only in constructive and not actual possession of the illegal substance. Furthermore, he theorizes that since constructive possession was not instructed on, there was insufficient evidence to prove the charge. He attempts to rely on *Staley* and *Callahan* as authority for the idea that an item on one's person does not amount to "actual" possession.

However, these cases simply don't stand for that premise, and indeed are among the plethora of cases which uphold quite the opposite.

The defendant in 1969's *Callahan* had his conviction overturned for insufficient evidence after the State attempted to rely upon his presence next to drugs while visiting as a guest on a houseboat or, alternatively, his admission to handling those drugs earlier that day to prove constructive or actual possession, respectively. 77 Wn.2d at 29. The Court found that the defendant was not in constructive possession, citing the fact that he did not live there and that the owner of the houseboat actually testified that the drugs belonged to him and that only he had sole control over them. *Id.* at 31. With regard to actual possession, the Court was again not convinced, holding that "**since the drugs were not found on the defendant**, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession." *Id.* at 29 (emphasis added). It characterized this earlier contact with the drugs as "a passing control which is only momentary handling." *Id.*

After several years of confusion over what this phrase lent to the concept of possession, clarification came in 1994 with *Staley*. The defendant in *Staley* admitted to having and was indeed found with a glass vial of cocaine in his pocket. 123 Wn.2d at 796. At trial, he framed his defense as "unwitting possession," but rather than using the accepted

instruction on that defense, he requested an instruction he had crafted from the language of *Callahan* which stated that "fleeting, momentary, temporary or unwitting possession" was not unlawful. *Id.* In finding that the denial of this erroneous instruction was proper and upholding the defendant's conviction for possessing the cocaine in his pocket, the *Staley* Court took a moment to make clear that the Court in *Callahan* was merely focused on the "quantum of evidence" necessary to prove possession. *Id.* at 801. It pointed out *Callahan* had relied upon language from the factually similar case of *United States v. Landry*, 257 F.2d 425 (7th Cir.1958), and that the government in both cases had inappropriately attempted to prove actual possession by relying solely on the defendant's admission to handling the drugs at an earlier time since neither defendant was "**physically in possession of the drugs**." *Staley*, 123 Wn.2d at 801 (emphasis added). In summarizing the effect and meaning of its prior decision, the Court stated,

> "*Callahan* did not create a legal excuse for possession based on the duration of the possession. Rather, evidence of brief duration or 'momentary handling' goes to the question of whether the defendant had 'possession' in the first instance. Depending on the total situation, a 'momentary handling,' along with other sufficient indicia of control over the drugs, may actually support a finding of possession."

Id. at 802. *Callahan* was a case about sufficiency of the evidence while *Staley* was an exercise in defining the proper instruction on unwitting possession, although, as emphasized in the quoted language above, both Courts made reference to the fact that actual possession means physically having the item "on" one's person. *Callahan*, 77 Wn.2d at 29; *Staley*, 123 Wn.2d at 801.

With his absurd argument, the Appellant apparently believes that the only way to be in actual possession of methamphetamine is to have it unpackaged and in the palm of his hand in contact with his skin. He had the bag of methamphetamine on his person. This is plainly "actual" possession, and with the evidence which was presented to jury and summarized previously viewed in the light most favorable to the State, a rational trier of fact could have found that the Appellant was in possession of methamphetamine.

b) Considering his agreement to the jury instructions given, the Appellant cannot now complain on appeal that the instructions were improper.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wash.2d 176, 191, 721 P.2d 902 (1986). However, he is not entitled to an instruction which inaccurately represents the law or for which there is no

evidentiary support. *State v. Hoffman*, 116 Wash.2d 51, 110-11, 804 P.2d 577 (1991). Furthermore, under RAP 2.5, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." A party may not request an instruction and later complain on appeal that the requested instruction was given, even if the instruction was missing an essential element of the charge or caused an error of constitutional magnitude. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002) (citing *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). Even if there was error in failing to the give the instruction the Appellant now insists upon having, that error was invited.

CONCLUSION

The Appellant, over the State's objection, was granted the defense instruction he requested and was able to argue his misguided theory that forgetting about your drugs amounts to "unwitting possession." He was not entitled to a constructive possession instruction because there was no evidentiary support for that theory, and indeed even trial counsel was able to perceive as much with his acceptance of the jury instructions. The Appellant received a fair trial at the conclusion of which twelve jurors quickly saw through his "defense" and found him guilty as charged. This court should uphold the conviction.

DATED this 7th day of February, 2017.

Respectfully Submitted,

BY: s/ Lindsey A. Millar
LINDSEY A. MILLAR
Deputy Prosecuting Attorney
WSBA # 46165

GRAYS HARBOR COUNTY PROSECUTOR

February 07, 2017 - 10:53 PM

Transmittal Letter

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